IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL HOOF, *Plaintiff in Error,* *vs.* PACIFIC AMERICAN FISHERIES, *Defendant in Error.*	No. 3590

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division

HON. EDWARD E. CUSHMAN, *Judge.*

BRIEF OF DEFENDANT IN ERROR

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STATEMENT OF CASE.

This is an appeal from a judgment, dismissing an action at law for personal injuries, entered after the court had sustained a demurrer to the complaint. The action was originally begun in the Superior Court of Whatcom County, State of Wash-

ington, and removed by the defendant to the United States District Court, the ground of removal being diversity of citizenship.

The complaint alleges that in the month of April, 1919, the defendant was engaged in building a number of vessels for the government. The plaintiff was employed by the defendant as a watchman on one of these hulls, known as the "Cleo," and while so employed was injured by reason, so it is said, of the negligence of the defendant in not properly securing certain steps leading from the bridge deck to the main deck. The complaint affirmatively states that at the time of the accident the hull "Cleo" was not yet completed as a ship, although then afloat in navigable water and moored to the defendant's dock at South Bellingham.

After the case had been removed to the United States District Court, the defendant demurred on the following grounds: (1) That the court has no jurisdiction of the subject matter of the action attempted to be pleaded in the complaint, or the parties thereto. (2) Said complaint does not set forth facts sufficient to constitute a cause of action and affirmatively shows that the plaintiff has no cause of action or right to recover (Transcript of Record, page 6).

This demurrer was sustained and the action dismissed as we have stated.

POINTS AND AUTHORITIES.

I.

The Workmen's Compensation Act of the State of Washington abolishes the jurisdiction of the courts to adjudicate claims arising out of injuries sustained by workmen to the full extent that it is within the power of the state to abolish such remedies, but for want of power the state statute does not extend to a maritime tort for which a remedy is provided in admiralty.

Stertz vs. Industrial Insurance Commission, 91 Wash. 588;

State ex rel. Jarvis vs. Daggett, 87 Wash. 253;

Shaughnessy vs. Northland Steamship Co., 94 Wash. 325;

Atlantic Transport Co. vs. Imbrovek, 234 U. S 63; 58 L. Ed. 1028;

S. P. Co. vs. Jensen, 234 U. S. 205; 61 L. Ed. 1086;

Peters vs. Veasy, 251 U. S. 121.

II.

Admiralty has no jurisdiction in a tort action unless the service is maritime—locality not being the sole test of admiralty jurisdiction.

Campbell vs. Hackfeldt, 125 Fed. 696;
Atlantic Transport Co. vs. Imbrovek, supra;
S. P. Co. vs. Jensen, supra.

III.

The services of a watchman in no way connected with the navigation of a vessel are non-maritime.

The America, 56 Fed. 1021;
The Sirus, 66 Fed. 226;
The Furber, 157 Fed. 124;
The Fortuna, 206 Fed. 573;
The Sinaloa, 209 Fed. 287.

IV.

An incompleted hull is not an instrumentality of commerce and navigation, even though afloat in navigable water.

Thames Towboat Co. vs. The Schooner Francis McDonald (U. S. Supreme Court Advance Opinions issued January 1, 1921).

ARGUMENT.

In the last analysis the decision in this case will depend upon the answer which the court shall give to one clear-cut question of law which may be stated thus: Is a workman, employed as a

watchman on an uncompleted hull, afloat in navigable water but moored to the dock of the builder, engaged in the performance of a maritime service?

If such a person is engaged in a maritime service, the decision of the court below is wrong. On the other hand, if such a service is non-maritime, the judgment appealed from should stand affirmed. One or the other of these results follows, because the maritime or non-maritime character of the service determines the application or non-application of the Workmen's Compensation Act to the claim asserted by the plaintiff in error. If the compensation act comprehends the claim asserted the plaintiff in error cannot maintain an action in the courts. If the Workmen's Compensation Act does not comprehend this claim, he may sue at law to recover his damages.

At the very outset we wish to make clear that this demurrer, so far as it challenges the *jurisdiction* of the United States District Court to which the cause was removed by the defendant, was not interposed on any ground that goes to the jurisdiction of that court, because and only because it is a federal court. The objection on the ground of jurisdiction was only intended to suggest that, by reason of the existence and provisions of the Workmen's

Compensation Act of Washington, no court, neither state nor federal, has jurisdiction to render a judgment for damages in a case like this, because by the terms of the Washington compensation statute, the jurisdiction of all courts has been abolished with respect to claims arising out of accidents that fall within the terms of the act. In this aspect of the matter, the objection to jurisdiction is perhaps included in the more general specification that the complaint fails to state facts sufficient to constitute a cause of action cognizable in a court of law.

It is the contention of the defendant in error that the work in which the plaintiff in error was engaged, was a non-maritime service within the scope of the Workmen's Compensation Act and therefore excluded from the jurisdiction of the courts.

In the year 1911, the legislature of the State of Washington passed an act entitled, "An Act Relating to the Compensation of Injured Workmen in Our Industries," etc. (Chap. 74, Laws 1911, page 345). In order to make clear the purpose and scope of that act, it is not necessary now to do more than refer to the case of *Stertz vs. Industrial Insurance Commission,* 91 Wash. 588, in which the Supreme Court of Washington analized the scope of the

statute and epitomized its purpose in the following language: "To sum up, our act positively ends the "jurisdiction of the courts,' on 'all phases' of master and servant liability" (p. 595). As construed by the Supreme Court of Washington in the decision just mentioned, the Workmen's Compensation Act undertakes to completely abolish the jurisdiction of all courts to deal with such claims to the full extent that it is within the power of the state to deny jurisdiction to the courts. The Supreme Court of Washington, however, has recognized that there is a field over which the state has no legislative power, and as to this field the compensation act is not operative for want of such power. The exception includes only maritime claims within the admiralty jurisdiction.

In *State ex rel. Jarvis vs. Daggett,* 87 Wash. 253, and *Shaughnessy vs. Northland Steamship Co.,* 94 Wash. 235, the Supreme Court of Washington held that the Workmen's Compensation Act could not, constitutionally, be construed to extend to maritime employments. These decisions of the Supreme Court of Washington are in exact harmony with the decisions of the Supreme Court of the United States on the same subject, namely, *Atlantic Transport Co. vs. Imbrovek, supra; S. P. Co. vs. Jensen,*

supra, and *Peters vs. Veasy, supra.* It therefore is quite clear that the Workmen's Compensation Act completely abolished the jurisdiction of the courts with respect to all claims of workmen, save only those cognizable in admiralty. If then the claim asserted by the plaintiff in error is non-maritime, the court has no jurisdiction over it, while, on the other hand, if the claim is really maritime, the courts have jurisdiction, because it is beyond the power of the state to modify or abolish the admiralty jurisdiction. If the claim, being maritime, is one which could have been asserted in admirality, it may likewise be asserted in the form of a common law action by reason of that provision of the federal judicial code conferring admiralty jurisdiction on the district courts, but "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it." (*Larson vs. Alaska Steamship Co.,* 96 Wash. 665.) The question then is, as we have stated, whether the plaintiff in error could have maintained an action in admiralty for the injuries alleged in the complaint. It is our contention that such an action could not have been maintained because the service in which the plaintiff in error was engaged was clearly non-maritime.

In putting forth this contention, we rely upon the decision of this court in *Campbell vs. Hackfeldt, supra.* That was an appeal from the District Court of Hawaii, which sustained an exception to a libel for want of jurisdiction. The libelant, a stevedore, sued in admiralty for injuries sustained in connection with the unloading of cargo. The injuries were not caused by any fault of the ship, its officers, or owner, but were alleged to have been caused by the carelessness of the stevedore's employer, a corporation engaged in loading and unloading ships at Honolulu. The District Court dismissed the libel for want of jurisdiction on the ground that the service was non-maritime and this court, on appeal, sustained that decision. Among other things, this court said:

> "The fundamental principle underlying all cases of tort, as well as contract, is that, to bring a case within the jurisdiction of a court of admiralty, maritime relations of some sort must exist, for the all-sufficient reason that the admiralty does not concern itself with non-maritime affairs (p. 697).
>
> "Torts, as well as contracts, not maritime, are outside of admiralty cognizance (p. 697).
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> * * * *
>
> "In the case of torts, locality remains the test, for the manifest reason that, to give an admiralty court jurisdiction, they must occur in a place where the law maritime prevails. But

> this is by no means saying that a tort or injury in no way connected with any vessel, or its owner, officers, or crew, although occurring in such a place or territory, is for that reason within the jurisdiction of the admiralty. On the contrary, it is, as has been seen, only of maritime contracts, maritime torts, and maritime injuries of which the United States courts are given admiralty jurisdiction. These views are not in conflict with any decision brought to our notice, or that we have been able to find'' (p. 700.)

In rendering that opinion, this court quoted with approval from an English case, in part as follows:

> '' * * * You have to consider three things—the locality, the subject-matter of complaint, and the person with regard to whom the complaint is made. You must consider all these things in determining whether the admiralty court has jurisdiction'' (p. 700).

In the Campbell decision this court analyzed the general language used in many of the cases to the effect that in tort jurisdiction of admiralty depends on locality, and it was clearly pointed out that none of these decisions, properly considered, could be construed as holding that locality and locality alone is the test in tort cases. The test of locality must, it is true, be met, but the tort must also be maritime in character.

It has been thought by some that the decision in the *Campbell* case has been weakened by the later decisions of the Supreme Court of the United States in *Atlantic Transport Co. vs. Imbrovek, supra,* and *S. P. Co. vs. Jensen, supra.* When, however, those decisions are examined, it will be found that, instead of in overruling the *Campbell* decision they really approve the rule of law therein decided.

Let us re-state what was held by this court in the *Campbell case.* The general rule was announced that, a tort to be maritime must (a) occur upon navigable water, and (b) must be related to commerce and the navigation. Applying those tests to the facts before it, the court in the *Campbell* case held that a stevedore injured under the circumstances stated was not within the rule, because, although the rule was met so far as locality was concerned, it was not met so far as the nature of the service was involved. In other words, in the *Campbell* case it was held that a stevedore employed as the libelant in that case was employed was not engaged in the performance of a maritime service.

In *Atlantic Transport Co. vs. Imbrovek, supra,* the Supreme Court of the United States was called upon to consider to what extent an injury to a

stevedore might be within the admiralty jurisdiction. The libelant in that case was a stevedore employed in loading a ship which was actually employed in commerce and navigation. In holding that this stevedore could sue in admiralty for an injury sustained in the course of his employment, the court, after referring to the numerous cases stating that locality is a test of admiralty jurisdiction in cases of tort, then went on to say that if there was a further test to be applied, namely, the test of character of service, that further test was also met, for the service in which the stevedore was engaged was in fact of a maritime character. The court said:

> "The libelant was injured on a ship, lying in navigable water, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. * * *"

In the *Imbrovek* decision the Supreme Court did not deny the correctness of the rule of law announced by this court in the *Campbell* case, but only denied its application to a stevedore engaged on a vessel then employed in commerce. This decision of the Supreme Court falls far short of holding that, every tort that occurs on navigable water is of necessity cognizable in admiralty merely

by reference to the test of locality. The *Imbrovek* case, it is clear, leaves the rule of law announced in the *Campbell* case unimpaired and only denies its application to stevedores employed in loading a ship presently employed in commerce and navigation.

In *S. P. Co. vs. Jensen, supra,* the Supreme Court of the United States, following the *Imbrovek* decision and construing the compensation act of New York, held that such act was not applicable to a stevedore injured in connection with work on a vessel engaged in commerce and navigation, because the service was *maritime in its nature* and therefore within the admiralty jurisdiction.

After the decision in the *Jensen* case that provision of the federal judicial code which saves to suitors in admiralty an alternative remedy at common law, was amended by adding thereto a further provision reading as follows:

> "And to claimants the rights and remedies under the Workmen's Compensation Law of any state."

This additional provision is commonly known as the Johnson Amendment and came to the attention of the Supreme Court in two subsequent decisions, namely, *Peters vs. Veasy,* 251 U. S. 121, 64 L. Ed. ...., and *Knickerbocker Ice Co. vs. Stewart*

(decided May 17, 1917, reported in United States Supreme Court Advance Opinions, issue of June 15, 1920). If there is any doubt as to the exact ground of the decisions in the *Imbrovek* and *Jensen* cases, that doubt is completely dissipated by what the court said in the case of *Peters vs. Veasey.* In that decision the court made it plain that the two prior decisions under discussion were based on the finding that the ordinary work of stevedoring and longshoreing is maritime in character and for that reason within the admiralty jurisdiction. So far as the Johnson Amendment was involved in the *Veasey* case, the court merely held that that amendment had no application to accidents happening before the amendment became effective. In the last decision entitled *Knickerbocker Ice Co. vs. Stewart, supra,* the court was called upon to pass upon the Johnson Amendment and then held that while congress itself might pass a compensation law of uniform application to maritime affairs, it could not constitutionally subject maritime relations to the varying provisions of the compensation acts of the different states.

Considering these various decisions to which we have called attention, two rules are very plainly deducible, first, that where a compensation act exists

as comprehensive as that of the State of Washington, the jurisdiction of courts over non-maritime accidents is completely abolished; and, second, that no state compensation act, however comprehensive it may be, can be construed to abolish the jurisdiction of the courts with respect to torts that are maritime.

It is admitted by the plaintiff in error (brief of plaintiff in error, p. 11) that the decision of this court in *Campbell vs. Hackfeldt* is squarely in point against the contention of plaintiff in error. It is not true, however, as plaintiff's counsel state, that that decision abolishes the test of locality in tort cases. The decision very plainly states that locality is a test, but not the exclusive test. The only authority, if it may be called such, cited in direct opposition to the conclusion reached in the *Campbell* decision is a quotation from the *Harvard Law Review*. That quotation from that periodical was noticed by this court in its opinion in the *Campbell* case, and what was there said by the court sufficiently disposes of the observations of the unknown author of that article.

There is nothing in any of these decisions of the Supreme Court of the United States that impairs in the least the rule of law announced in the

Campbell case, namely, that a tort to be maritime must not only occur on navigable water, but must also have some relation to the operation of a ship engaged in commerce and navigation.

If the rule of the *Campbell* decision is the law it must follow that a watchman employed on an uncompleted hull is not engaged in a maritime service for two reasons more or less closely related. First, because a watchman, even though employed on a completed ship, is not engaged in the maritime service when the ship is not engaged in commerce and navigation, and, second, an uncompleted hull is not an instrumentality of commerce and navigation subject to admiralty jurisdiction, even though afloat.

In *The America,* 56 Fed. 1021, it was held that a watchman employed on a dredge lying in port is not engaged in performing a maritime service. In *The Sirus,* 65 Fed. 226, it was held by Judge Morrow that the service rendered by a watchman employed to care for and clean the machinery and maintain a general care and supervision of a vessel lying at her home port, out of commission and with no voyage in contemplation, is not maritime. In *The Furber,* 157 Fed. 124, it was held that the service rendered to a domestic vessel after she had

been laid up at a wharf for the winter, in pumping her out, attending to her lines, etc., are not those of a mariner and cannot be made the basis of a maritime lien. To the same effect are the opinions in *The Fortuna,* 267 Fed. 573, and *The Sinaloa,* 209 Fed. 287, decisions rendered by district judges of this circuit. It is true that these decisions concern claims sounding in contract and not in tort, but they are nevertheless pertinent, for if the character of the service is material in tort cases, as held in the *Campbell* case, then these cases which decide that watchmen aboard vessels not in active service, do not perform a maritime duty are in point. It must be clear that, if the service of a watchman, aboard a boat temporarily out of commission, is not maritime, the service of a watchman aboard an uncompleted hull, moored to the builder's wharf, can not possibly be maritime, for such work is still further removed from commerce and navigation.

It will be recalled that the complaint in this action affirmatively states that the hull "Cleo," although launched, remained uncompleted. The Supreme Court of the United States in the recent case of *Thames Towboat Co. vs. The Schooner Francis McDonald,* decided December 6, 1920, and reported in the advance opinions of the United

States Supreme Court, issue of January 1, 1921, held that a contract to furnish materials, work and labor for the completion of a vessel made after such vessel was launched, but while not yet sufficiently advanced to discharge the functions for which she was intended, is not within the admiralty and maritime jurisdiction. This decision, it seems to us, is squarely in point. If the hull "Cleo," being an uncompleted vessel, had not yet become an instrumentality of commerce and navigation, so that admiralty jurisdiction could attach to her, in a case of contract, how can it be claimed that the service of a watchman aboard that uncompleted hull is maritime in character so that the admiralty jurisdiction does attach in a case of tort?

A boundary between the admiralty and the common law jurisdiction must be drawn somewhere and the Supreme Court in the case last cited has held that the admiralty jurisdiction does not attach in any event prior to the time that the vessel is so far advanced towards completion as to be able to discharge the functions for which she is intended.

AUTHORITIES CITED BY PLAINTIFF IN ERROR.

In the second subdivision of their brief, counsel for plaintiff in error cited a number of cases to

support their claim that the *Campbell* decision is erroneous.

In *Leathers vs. Blessing* (26 L. Ed. 1192), 15 Otto, 626, the Supreme Court sustained the admiralty jurisdiction in a suit *in personam* brought by a consignee injured through the negligence of a ship and its officers while on board on business connected with the ship. The case is really an authority for our contention, for it recognizes that the jurisdiction in admiralty depended upon the nature of the libelant's business at the time of his injury. If locality was the sole test of jurisdiction it would have been wholly unnecessary for the Supreme Court in that case to inquire whether or not the libelant was aboard the ship in connection with the ship's business as a carrier of commerce. The jurisdiction in admiralty was sustained, for "although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time." There is nothing in this case that lends support to the contention that an uncompleted hull, moored at the dock of the builder, is within the admiralty jurisdiction merely because afloat.

Jervey vs. The Carolina, 66 Fed. 1013, cited in plaintiff's brief, page 12, is but a case stating

the indisputable rule that the courts of admiralty have jurisdiction to determine the right to the possession of vessels engaged in commerce and navigation. There is nothing in this decision holding that an accident aboard an uncompleted hull is a maritime tort.

Tillworth vs. Moore, 4 Fed. 231, is a decision sustaining the admiralty jurisdiction *in personam* in a suit against a ship owner for the abduction of a minor and his maltreatment while aboard. It is not pertinent to the present inquiry.

Anderson vs. E. B. Wood, 38 Fed. 444, concerns an injury to a seaman aboard a ship engaged in commerce and navigation. The facts are not at all similar to those in the case at bar.

The H. S. Pickands, 42 Fed. 239, involved an injury to a person engaged in doing repair work on a vessel lying in winter quarters at a wharf, the injuries being caused by a defect in a ladder from the ship to the wharf. The jurisdiction in admiralty was denied.

The Strabo, 90 Fed. 110, concerned an accident where the injured person was employed in loading a vessel lying at a dock, the negligence being attributable to the ship. This decision discusses at some

length the vexed question as to when admiralty has jurisdiction where the cause has its inception on shipboard but the damage is consummated on land, or *vice versa.* We do not think it is necessary to go into a discussion on this question for the facts involved in the case cited are entirely dissimilar to those at bar.

Steamship Co. vs. Hall Bros., 249 U. S. 119, 63 L. Ed. 510, is a case in which the jurisdiction in admiralty was affirmed in a suit brought *in personam* to recover for repairs made to a ship and the incidental use of marine ways in connection with such repairs. This decision contains nothing bearing on the case at bar, except the general observation that locality is a test of jurisdiction in cases of tort. This is but another repetition of that general observation which was very clearly explained by this court in the *Campbell* decision.

The Hokkai Maru, 171 C. C. A. 353, to which passing reference is made on page 22 of plaintiff's brief, is a very different case. It involved an injury to a person employed aboard a ship then actually engaged in commerce and navigation. It may be admitted that the jurisdiction in such cases is settled beyond dispute, but that by no means establishes that the admiralty jurisdiction extends to injuries

sustained by a watchman aboard an uncompleted hull that never has been engaged in commerce.

MEASURE OF DAMAGES.

In the third subdivision of their brief, counsel for plaintiff in error argue that the plaintiff is entitled to recover full indemnity. It is not clear to us what relation this contention has on this appeal, which does not present any question as to how much the plaintiff is entitled to recover, but only whether he is entitled to recover at all in an action at law.

It certainly would be most inconsistent for us to contend that this tort is non-maritime and then insist that the measure of recovery is limited by a rule applicable only to maritime torts. We make no such contention and if we did make it, it would be wholly beside the question presented on this appeal. We therefore think it unnecessary to follow the argument advanced by counsel for plaintiff in error further than to remark that the rule of full indemnity applicable in admiralty by reason of the unseaworthiness of the vessel can in the nature of things only apply in a case of injury sustained aboard a vessel actually engaged in commerce and navigation. The issue of seaworthiness in the nature

of things can have no application in the case of an uncompleted hull, for to say that the law requires an uncompleted hull to be seaworthy is equivalent to saying that the law requires a vessel to be brought into existence instantaneously.

Even if seaworthiness were a factor in this case, which it is not, nevertheless, the facts stated in the complaint do not amount to unseaworthiness.

Hanrahan vs. Pacific, etc., Co., 262 Fed. 951;
The Santa Barbara, 263 Fed. 369.

In the *Hanrahan* case the court said:

> "Seaworthiness is a relative term; a vessel may have that quality in port and yet be wholly unfit for rough water; and to say that this vessel was unseaworthy because she had no handrail up, while lying along side a wharf discharging cargo, is merely untrue."

So in the case at bar, to say that an uncompleted hull is unseaworthy, merely because some appurtenance has not yet been permanently fastened, amounts to merely a misuse of terms.

The suggestion appearing in several places in the brief filed on behalf of the plaintiff in error to the effect that if this judgment is not reversed, the plaintiff in error will have been left without any

remedy at all, is neither pertinent nor well founded. If the Industrial Insurance Commission of Washington erroneously decided a question of law, that decision is of course not binding on anybody. If the plaintiff in error is entitled to compensation from the state fund, he can enforce that right by suing the commission.

Stertz vs. Industrial Insurance Commission, 91 Wash. 588;

State ex rel. Jarvis vs. Daggett, 87 Wash. 253.

The fact that the plaintiff in error has seen fit to acquiesce in an erroneous ruling made by this administrative board can not be determinative of the jurisdiction of the courts.

We submit, therefore, that this uncompleted hull was not an instrumentality of commerce and navigation; that the plaintiff in error was engaged in a non-maritime service, that the tort, if any tort was committed, was of a non-maritime nature, and therefore, under the repeated rulings of the Supreme Court of Washington, and the federal decisions to which we have called attention, the trial judge was right in holding that there is no juris-

diction in the courts, but that the plaintiff in error must seek his remedy under the compensation act.

Respectfully submitted,

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